

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

w/ affidavit

75-7283

To be argued by
NAOMI REICE BUCHWALD

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-7283

SAMUEL H. SLOAN, SAMUEL H. SLOAN & CO.,

Plaintiffs-Appellants,

—against—

SECURITIES & EXCHANGE COMMISSION, UNITED STATES
OF AMERICA as the SECURITIES & EXCHANGE COMMISSION,
NATIONAL QUOTATION BUREAU, INC., BUNKER
RAMO CORP., NATIONAL ASSOCIATION OF SECURITIES
DEALERS, INC., DISCLOSURE, INC., NATIONAL CLEAR-
ING CORP.,

Defendants-Appellees.

ON APPEAL FROM AN ORDER AND JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA—APPELLEE

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—against—

SECURITIES & EXCHANGE COMMISSION, UNITED STATES OF
AMERICA as the SECURITIES & EXCHANGE COMMISSION,
NATIONAL QUOTATION BUREAU, INC., BUNKER
RAMO CORP., NATIONAL ASSOCIATION OF SECURITIES
DEALERS, INC., DISCLOSURE, INC., NATIONAL CLEAR-
ING CORP.,
Defendants-Appellees.

**BRIEF FOR THE UNITED STATES OF
AMERICA—APPELLEE**

Preliminary Statement

Plaintiff appeals from a judgment dismissing his complaint as to all defendants without leave to replead. (A. 3, A. 270)* Specifically, with respect to the United States, plaintiff urges that the District Court, Griesa, *J.* erred in denying plaintiff's motion for entry of a default judgment against the United States (A. 3, A. 186). We submit Judge Griesa was correct both in denying the application for a default judgment and in dismissing the complaint as to the United States.

* All references preceded by "A." are to the Joint Appendix on appeal.

Statement of Facts

On June 24, 1974, plaintiff filed the complaint in 74 Civ. 2792 (S.D.N.Y.) (A2). That complaint did not name the United States as a defendant.

On October 22, 1974, plaintiff filed an amended summons and complaint (A. 2). This amended complaint named for the first time the "United States of America as the Securities and Exchange Commission" as a defendant, in addition to the defendant Securities and Exchange Commission ("SEC").

On November 8, 1974, an attempt at service was made, but instead of serving the United States Attorney's Office the marshal served Henry Wong at 90 Church Street (A. 67). As plaintiff has recognized, "Henry Wong is presumably the same Henry Wong as the litigation clerk for the S.E.C." (App. Br., 53).

In January of 1975, motions to dismiss were filed by several defendants including the SEC (A. 3). By motion, dated February 7, 1975, plaintiff moved for the entry of a default judgment against the United States.

On February 14, 1975 Judge Griesa heard oral argument of the motions of all parties. At that argument the attorney for the SEC * stated that the United States had not been served (A. 296) and the District Court in its oral decision so noted (A. 300).**

* The SEC may and customarily does represent itself in civil proceedings in district courts. *SEC v. Robert Collier & Co.*, 76 F.2d 99 (2d Cir. 1935).

** After being served with a copy of plaintiff's motion seeking a default judgment against the United States, the United States Attorney's Office wrote a letter, dated February 13, 1975, to Judge Griesa, with a copy to the plaintiff, stating our position

[Footnote continued on following page]

On February 21, 1975 Judge Griesa endorsed the motions which had been made, referring to the minutes of February 14, 1975. Judge Griesa denied plaintiff's motion for a default judgment against the United States and granted the SEC's motion to dismiss as to all defendants without leave to replead. Those endorsements were filed on February 24 (A. 3).

On February 24, 1975 the United States Attorney's Office was served with a copy of the amended complaint (A. 4).

On February 27, 1975, judgment was entered by the Clerk of the Court dismissing the complaint as to all defendants without leave to replead (A. 270).

On March 28, 1975, plaintiff filed a notice of appeal from orders of Judge Griesa (A. 4).

The body of the Amended Complaint eventually served upon the United States only once mentions the United States of America independent of the SEC and that is in paragraph 8 (A. 27), where the United States is defined as a sovereignty. All other references of the United States are in the context of a demand for damages of \$6,000,000 allegedly resulting from tortious acts by the SEC pursuant to allegedly unconstitutional statutes and regulations (see paras. 285, 305; A. 61, A. 64).

that, as demonstrated by the marshal's return (A. 67) we had not been served and accordingly the entry of a default judgment was entirely inappropriate. In at least one prior conversation with plaintiff, Assistant United States Attorney Naomi Reice Buchwald had informed plaintiff that not having been served we would not appear.

ARGUMENT

POINT I

The District Court properly denied plaintiff's motion for default judgment against the United States.

Rule 4(d)(4) of the Federal Rules of Civil Procedure provides for the method of service of a complaint upon the United States. Service must be made by delivering a copy of the summons and complaint to the United States Attorney in the district where the action is brought *and* by sending a copy by registered or certified mail to the Attorney General in Washington, D.C. The record in this case is clear: service had not been made upon the United States Attorney's Office at the time plaintiff made his motion for a default judgment, or at the time of oral argument of that motion, or at the time Judge Griesa signed the order dismissing the complaint as to all defendants. Indeed, it is only because of the strictures of Rule 58, Fed. R. Civ. P., requiring the entry of an order or judgment for effectiveness that the entire case had not been dismissed before the United States was finally served on February 24, 1975. Thus, even on the date that judgment was entered by the Clerk of the Court, February 27, 1975, the time of the United States to answer the complaint had not expired. Moreover, before the answering period had run, a notice of appeal had been filed and jurisdiction became vested in this Court. The United States was never in default. Accordingly, Judge Griesa properly denied plaintiff's motion.

POINT II

The District Court properly dismissed the complaint as against the United States.

In addition to denying plaintiff's motion for a default judgment, the district court took an additional action affecting the United States, to wit, it dismissed the complaint as to *all* named defendants including the United States. A district court has the power to dismiss a complaint on jurisdictional grounds even in the absence of a motion on behalf of the defendant affected. *Turley v. Hall's Motor Transit Co.*, 296 F. Supp. 1183 (M.D. Pa. 1969); *Kapp v. Frank W. Kerr & Co.*, 2 F.R.D. 509 (E.D. Mich. 1942); 3 *Moore's Federal Practice* ¶ 16.16, at 1125 (1974).

An examination of the complaint shows that the district court lacked jurisdiction over the subject matter of the action. As against the United States, the complaint is one for damages for the allegedly tortious acts by the Securities and Exchange Commission and its employees. Those acts were allegedly undertaken by SEC personnel acting in their official capacities pursuant to provisions of the securities laws and regulations enacted thereunder.

An action in tort against the United States must of course be brought in accordance with the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.* *Dalehite v. United States*, 346 U.S. 15 (1953). Plaintiff, having failed to exhaust his administrative remedies, may not commence an action under the Federal Tort Claims Act. 28 U.S.C. § 2675. Moreover, even if plaintiff should file an administrative claim and exhaust his administrative remedies, the wrongs alleged in the complaint would not be actionable under the Federal Tort Claims Act, for they come within the exceptions of 28 U.S.C. § 2680(a) for acts

"in the execution of a statute or regulation, whether or not such statute or regulation be valid" or for discretionary functions or duties. See, e.g. *Dalehite v. United States, supra*; *Redmond v. United States*, 518 F.2d 811 (7th Cir. 1975). Recently the Court of Appeals for the District of Columbia has observed that "even a gross abuse of discretion will not predicate an award of tort damages." *Scanwell Laboratories, Inc. v. Thomas*, 521 F.2d 941, 948 (D.C. Cir. 1975).

CONCLUSION

The judgment and order below should be affirmed.

Dated: New York, New York
December, 1975

Respectfully submitted,

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